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In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Baltimore Gas & Elec. Co. v. *ICC*, 672 F.2d 146 5

Eagle-Picher Industries v. *EPA*, 759 F.2d 905 6

International Brotherhood of Teamsters v. *ICC*, No. 85-1397 (D.C. Cir. filed June 28, 1985) 3

Norfolk Southern Corp.-Control-North American Van Lines, Inc., Finance Docket No. 30,5000 (I.C.C. Apr. 30, 1985) 3

Texas v. *United States*, 730 F.2d 409, amend, 749 F.2d 1144, cert. denied, No. 84-1712 (June 24, 1985) 4, 5

Toilet Goods Ass'n v. *Gardner*, 387 U.S. 158 ..... 3, 4, 5

Tri-State Motor Transit Co. v. *ICC*, 739 F.2d 1373, cert. denied, No. 84-1515 (June 24, 1985) 4, 5

United States v. *Rock Island Motor Transit Co.*, 340 U.S. 419 2

Page

Statutes:

Hobbs Act, 28 U.S.C. 2344 5

Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 *et seq.* 2

Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 *et seq.* 2

49 U.S.C. 11344(c) 2, 3

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MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION[1]

Petitioner contends that the court of appeals erred in dismissing, as not ripe for adjudication, a petition for review of a policy statement issued by the Interstate Commerce Commission (ICC).

1. In July 1984, an ICC policy statement, released after full public notice and comment, abolished the so-called "special circumstances" doctrine in the rail acquisition of

[1]The federal respondents are the Interstate Commerce Commission and the United States.

motor carriers.[2] *Acquisition of Motor Carriers By Railroads*, Ex Parte No. 438 (Pet. App. 8a-37a). By that action, the Commission altered its prior approach under which such acquisitions ordinarily were not approved unless the acquired motor carrier was restricted to operations auxiliary or supplemental to those of the acquiring railroad. The ICC indicated that it would henceforth examine such acquisitions on a case-by-case basis and not impose those restrictions automatically. *E.g.*, Pet. App. 19a-20a. In the future, a railroad seeking to acquire a motor carrier will have to demonstrate that the acquisition is consistent with the public interest, will not unreasonably restrain competition, and will result in the use of the motor carrier to public advantage in the acquiring carrier's overall transportation operations (*id.* at 27a-28a).

2. Petitioner and others sought review of the Ex Parte No. 438 policy statement in the United States Court of Appeals for the Ninth Circuit. The court of appeals

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[2]49 U.S.C. 11344(c) provides in pertinent part that the Commission may approve a railroad's acquisition of a motor carrier "only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition." For many years, and with this Court's approval (see *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951)), the Commission had interpreted this language to require that a rail applicant demonstrate that it would use the motor carrier to public advantage in its *rail* operations, and, unless "special circumstances" were demonstrated, the acquired motor carrier's operations were restricted to insure that its operations were auxiliary to or supplemented the railroad's operations.

Following enactment of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 *et seq.*, and the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 *et seq.*, which loosened regulatory strictures on the trucking and rail industries, the ICC reconsidered its prior interpretation and concluded that these dramatic legislative changes, coupled with current circumstances in the surface transportation industry warranted a new approach (Pet. App. 34a-36a).

dismissed the petitions as not presently ripe for judicial review (Pet. App. 2a), and subsequently amended its opinion (Pet. App. 5a-7a) to provide specifically that "[j]udicial review will be available to challenge an order of the I.C.C. that applies [the policy statement] to a specific factual situation."

3. While those proceedings were pending in the Ninth Circuit, a railroad filed an application with the ICC to acquire a motor carrier.[3] Petitioner opposed that application in the administrative proceedings, and in doing so disputed the validity of the Commission's recent policy statement. The Commission affirmed its Ex Parte No. 438 policy statement, and approved the acquisition pursuant to its revised statutory interpretation. Petitioner then sought review of that decision in the United States Court of Appeals for the District of Columbia Circuit.[4] Thus, petitioner is currently litigating the validity of the Commission's reinterpretation of 49 U.S.C. 11344(c), precisely the question it sought to raise in the Ninth Circuit.

4. As these recent developments confirm, the judgment of the court below is correct and further review by this Court is not warranted.

a. In performing the balancing prescribed by this Court's decision in *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 164 (1967), the court of appeals correctly concluded (Pet. App. 2a, 7a) that petitioner's challenge to the policy statement was not ripe for review because "[p]etitioners have not shown that the regulation immediately affects their

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[3] *Norfolk Southern Corp.—Control—North American Van Lines, Inc.*, Finance Docket No. 30,500 (I.C.C. Apr. 30, 1985).

[4] *International Brotherhood of Teamsters* v. *ICC*, No. 85-1397 (D.C. Cir. filed June 28, 1985).

day-to-day affairs."[5] Indeed, petitioner does not challenge the court of appeals' conclusions in this regard.

b. Rather than identify any error in the judgment below, petitioner only hypothesizes (Pet. 8-15) that it may be prevented from obtaining review of the Commission's policy statement in the future. Petitioner misapprehends both the court of appeals' decision and the process for review of Commission policy statements.

After being advised of the pendency of the D.C. Circuit proceedings (see Pet. for Rehearing 3), the court below amended its decision in this case to state (Pet. App. 7a) that "[j]udicial review will be available" when the Commission "applies I.C.C. Rule No. 438 to a specific factual situation." Thus, the court expressly avoided the problem petitioner anticipates, *i.e.*, inability to contest the validity of the policy in a later proceeding. And, as petitioner recognizes (Pet. 10 (footnote omitted)), "the government and the merging carriers have acknowledged the jurisdiction of the D.C. Circuit to consider the validity of th[e] policy." As this Court observed in *Toilet Goods*, 387 U.S. at 165, "[s]uch review will provide an adequate forum for testing the regulation in a concrete situation."[6]

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[5]In Ex Parte No. 438, the Commission simply announced a policy reinterpretation of the Interstate Commerce Act that would be applied in future cases. See, *e.g.*, Pet. App. 19a-20a, 27a, 29a-30a (stressing that the revised policy would mean only that cases will be examined on an individual basis without presuming the need for restrictions on the acquisitions).

[6]This case is wholly unlike those in which, petitioner contends (Pet. 10-14), the government has taken an inconsistent position. In neither *Tri-State Motor Transit Co.* v. *ICC*, 739 F.2d 1373 (8th Cir. 1984), cert. denied, No. 84-1515 (June 24, 1985), nor *Texas* v. *United States*, 730 F.2d 409 (1984), amended, 749 F.2d 1144 (5th Cir. 1985), cert. denied, No. 84-1712 (June 24, 1985), had a court of appeals previously held the ICC policies there at issue to be unripe for review. Quite the contrary. In both cases, the Commission policy had already been the

Petitioner then proceeds to a second level of speculation—the possibility that the D.C. Circuit will conclude sua sponte that it lacks jurisdiction, leaving petitioner without any opportunity to obtain judicial review of the ICC policy on the merits. Of course, even if that came to pass, the appropriate time to face the issue is then, and in the D.C. Circuit case, not on the wholly hypothetical basis that presently exists.

In any event, it is highly unlikely that petitioner would find itself without a chance to challenge the Ex Parte No. 438 policy in court. Consistent with this Court's determination in *Toilet Goods*, 387 U.S. at 165, the District of Columbia Circuit has considered how it will proceed when a Commission decision is held to be not ripe for review, but would become ripe more than 60 days after the issuance of the initial policy. The court explained (*Baltimore Gas & Elec. Co.* v. *ICC*, 672 F.2d 146, 149-150 (D.C. Cir. 1982)) that a party

> need not fear preclusion [of review] by reason of the 60-day stipulation in 28 U.S.C. § 2344. A time limitation on petitions for judicial review, it should be

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subject of judicial review and had been upheld on the merits. Thus, the government's position was that the Hobbs Act permits but a single, timely challenge to an agency decision.

Our position in *Tri-State* was based on the fact that the same parties had previously obtained review of the policy statement that formed the basis for a licensing proceeding, and, after failing on the merits in the first court, were again seeking review of that policy. In the government's view, which the court of appeals did not accept, the Hobbs Act barred such actions. Similarly, in *Texas*, the government argued unsuccessfully that parties to a rulemaking who fail to join other parties seeking review under the Hobbs Act, 28 U.S.C. 2344, cannot do so in a subsequent proceeding after the 60-day time limit of that section has run. Neither situation pertains here, or in the D.C. Circuit proceeding, because petitioner will not have previously obtained review of Ex Parte No. 438, and therefore review will be proper (and the court's jurisdiction is in fact not contested) in the application proceeding.

> apparent, can run only against challenges ripe for review. *See Investment Company Institute* v. *Board of Governors of the Federal Reserve System*, 551 F.2d 1270, 1280-81 (D.C. Cir. 1977). In the event that [petitioner], at some future date, should have a ripe case * * * it can file a complaint with the Commission and, if the complaint is rejected, seek our review within 60 days of that Commission order. In the course of that review, the Commission's interpretation * * * would be subject to our scrutiny. * * *

Accord, *Eagle-Picher Industries* v. *EPA*, 759 F.2d 905, 911-919 (D.C. Cir. 1985).

This is precisely how review of Ex Parte No. 438 is currently proceeding. Accordingly, there is no basis for petitioner's fear that some court may, sua sponte, raise the Hobbs Act statutory time limit to bar review of Ex Parte No. 438 (see Pet. 8). In these circumstances, the contention that review is warranted now is wholly without merit.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

FEBRUARY 1986

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Hamersley Iron Pty. Ltd. (WESTERN AUSTRALIA)
Hartford & Slocomb Railroad Company
Hillsdale County Railway Company, Inc.
India, Govt's of: Ministry of Railways (INDIA)
Japanese National Railways (JAPAN)
Korean National Railroad (KOREA)
LaSalle & Bureau County Railroad Company
Lenawee County Railroad Company, Inc.
Long Island Rail Road Company
Louisiana & North West Railroad Company
Manufacturers' Junction Railway Company
Maryland & Pennsylvania Railroad Company
Metro North Commuter Railroad Company
Michigan Northern Railway Company, Inc.
Middletown & Hummelstown Railroad Company
Minnesota, Dakota & Western Railway Company
Monongahela Connecting Railroad Company
New Orleans Public Belt Railroad
Northeast Illinois Railroad Corporation
Pacific Fruit Express Company
Pearl River Valley Railroad Company
Pickens Railroad-National Railway Utilization Corp.
Port Authority of New York & New Jersey (The)
Providence & Worcester Company
Public Transport Commission of New South Wales (AUSTRALIA)
Rede Ferroviaria Federal S.A. (BRAZIL)
River Terminal Railway Company
Roberval & Saguenay Railway Company (CANADA)
Roscoe, Snyder & Pacific Railway Company
San Diego & Arizona Eastern Transportation Company
Sierra Railroad Company
Somerset Railroad Corporation
South African Railways (REPUBLIC OF SOUTH AFRICA)
Southern Indiana Railway, Inc.
Spanish National Railways (RNFE) (SPAIN)

Taiwan Railway Administration
(REPUBLIC OF CHINA)
Texas & Northern Railway Company
Upper Merion & Plymouth Railroad Company
Victoria A Minas Railway (BRAZIL)
Wabush Lake Railway Ltd. (CANADA)
Warwick Railway Company
Washington Terminal Company
Yancey Railroad Company